

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**BILL L. BECK**

Claimant

V.

**FIVE STAR TRUCKING, LLC**

Respondent

AND

**ACCIDENT FUND INSURANCE CO.**

Insurance Carrier

Docket No. 1,067,563

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the November 3, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Bruce A. Brumley of Topeka, Kansas, appeared for claimant. Elizabeth R. Dotson of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to prove by a preponderance of the evidence that he injured his low back in the September 10, 2013, work-related accident. Claimant's request for medical treatment for the low back was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 9, 2014, Preliminary Hearing and the exhibits; the transcript of the October 29, 2014, Preliminary Hearing and the exhibits; the transcript of the October 24, 2014, evidentiary deposition of Bill Beck, Jr., and the exhibit; the transcript of the October 24, 2014 evidentiary deposition of Janet Beck and the exhibit; and the transcript of the October 24, 2014, evidentiary deposition of Charlotte Chambers and the exhibit, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant argues the credible evidence, including witness testimony, meets the burden of proving the work-related accident is the prevailing factor causing his low back pain.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues the preponderance of credible evidence proves claimant's work-related accident did not cause his low back condition.

The sole issue for the Board's review is: was claimant's September 10, 2013, work-related accident the prevailing factor in causing claimant's low back condition?

### FINDINGS OF FACT

Claimant was employed by respondent as a truck driver. On September 10, 2013, claimant hauled rock in a dump truck to a site in Olathe, Kansas. Claimant testified while dumping the load down an embankment, the truck quickly lifted into the air before dropping back to the ground. Claimant described:

. . . I backed down where they wanted the pile of rock dumped and I started raising the bed, and when it got all the way to the top the truck started going over backwards, and it went up, I don't know, 10, 12 feet or something like that, but it went up real fast, and when it did, it shoved my neck and my shoulder and everything into the roof of the truck and then the truck stopped.

Then once some of the rock had dumped out, well, evidently it had pushed the truck to go back down and so the whole truck and everything went down. And when it did, I bottomed out in the seat of the truck that I was in. I mean, it just slammed down, and then the truck started going back over again but it stopped and it stayed right there.<sup>1</sup>

Claimant explained the seat of the truck was an air ride seat which had lost all air by the time he landed. Claimant testified, "So when I come down and the truck slammed down, it was just like if I was standing on this table and just jumped off and just landed on the floor on my buttocks . . . ." <sup>2</sup>

Claimant stated he felt immediate pain in the base of his neck, his upper back, his buttocks, and his legs. Claimant also described tingling in his left hand and stated his left leg gave out when he exited the truck following the incident. Claimant testified:

Q. You said your left leg was giving away on you. Did you have any pain in your left leg?

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<sup>1</sup> P.H. Trans. (Apr. 9, 2014) at 8.

<sup>2</sup> *Id.* at 9.

A. Oh, yeah. It was going down the back of my leg up high, above the knee, and it was hurting real bad because I felt like it mashed the muscle, but it felt like there was somebody pouring warm water down the back of my leg.<sup>3</sup>

Claimant was asked by one of respondent's owners whether he wanted to see a doctor, but claimant stated he merely wanted to go home. Claimant returned home before visiting the emergency room at Ransom Memorial Hospital later that day. Claimant testified he complained of neck and arm pain at the hospital and underwent an x-ray of his neck. Claimant indicated he did not receive treatment at the hospital other than medication and a neck brace. Claimant further testified:

Q. Did they take any x-rays of your low back or your hip or your leg?

A. No, because, I mean, I thought it was the muscles that was mashed, and there was never any pain right in the spine.

. . . .

Q. Okay. And I don't have the records so I'm just going to ask you. Did you tell anybody at the ER that you had what you're calling muscle pain down your leg?

A. Well, you know what, I can't really answer that fairly because I was hurting more in my neck and my arm.<sup>4</sup>

Dr. Chris Fevurly, an occupational medicine physician, first examined claimant on September 18, 2013. Claimant complained of neck pain and left arm pain with numbness and tingling in the ulnar nerve distribution. Claimant provided a history of his work-related accident and subsequent hospital visit. Dr. Fevurly noted claimant's x-ray was unremarkable other than degenerative changes and noted the hospital had referred claimant to occupational medicine. Dr. Fevurly concluded claimant's neck pain was consistent with an acute strain in the presence of degenerative disease of the cervical spine and recommended physical therapy. Dr. Fevurly imposed restrictions of no lifting more than 10 pounds and no operation of hazardous machinery. Claimant testified respondent was unable to accommodate his restrictions.

Claimant continued to treat with Dr. Fevurly throughout September and October 2013 with complaints of neck and left arm pain. Dr. Fevurly recommended claimant undergo an EMG of the left arm and an MRI of the cervical spine.

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<sup>3</sup> *Id.* at 11.

<sup>4</sup> *Id.* at 20.

On November 4, 2013, Dr. Fevurly noted claimant was unable to undergo an MRI due to shotgun pellets located in his face. The EMG revealed peripheral nerve entrapment at the wrist with no apparent entrapment at the elbow. Dr. Fevurly noted “there were no changes consistent with cervical radiculopathy so at this point it would appear that we have regional neck pain with possible radiculopathy based on physical examination but not proven by EMG.”<sup>5</sup> Dr. Fevurly suggested physical therapy for possible relief of neck, left upper back and left shoulder pain.

Claimant filed an Application for Hearing with the Division on November 6, 2013, in which he claimed injuries to the head, neck, left shoulder, left arm, and left hand.

Claimant began therapy and stated a physical therapist asked if he had leg trouble. Claimant answered in the affirmative, claiming leg pain throughout the entirety of therapy. The therapist then tested claimant’s lower extremities. Claimant testified:

Anyway, she said to get up on the table, that she wanted to do a couple quick tests and see something. So she got me up on the table there and I was sitting there, and she said to start swinging my legs. Well, I had never done that because I couldn’t extend my leg before because it hurt too bad.

She told me to keep swinging them, and every time you swing them, extend them a little bit further each time. About the third time I extended this left leg out, it felt like somebody stuck me right in the backbone with a knife or something.<sup>6</sup>

Claimant returned to Dr. Fevurly shortly thereafter, on November 14, 2013. Dr. Fevurly noted claimant returned earlier than expected due to “a tremendous change in his clinical presentation.”<sup>7</sup> Dr. Fevurly indicated claimant complained of low back and left leg pain, with pain in the left buttock beginning approximately one week prior. Claimant disputed the observation, stating he informed Dr. Fevurly of left leg pain during his first visit in September 2013. Dr. Fevurly recorded:

[Claimant] tells me that he mentioned to me that he was having this burning down the left posterior leg and that was at the first visit, which would have been on 09/18/2013. I have gone back into my records here and I do not have any mention here of previous low back, left leg symptoms and thus, it would appear to me that this is a new symptom in the last week or so and [claimant] is somewhat upset by

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<sup>5</sup> *Id.*, Resp. Ex. A at 9.

<sup>6</sup> P.H. Trans. (Apr. 9, 2014) at 15-16.

<sup>7</sup> *Id.*, Resp. Ex. A at 7.

that in that he believes that his low back and left leg symptoms resulted from the 09/10/2013 event.<sup>8</sup>

Dr. Fevurly recommended claimant undergo a low back evaluation via his personal healthcare. He also suggested claimant receive a lumbar epidural injection and a myelogram of the lumbar and cervical spine. Dr. Fevurly noted claimant seemed resistant to pursuing treatment with his personal healthcare because claimant believed his lumbar condition to be work-related. Dr. Fevurly concluded, “[O]bviously we have got a change in his clinical scenario today. It has been present for a week. He states that it has actually been there off and on for about two months and I have no mention of previous low back, left leg symptoms and thus, we have a conflict and I see bad times arising.”<sup>9</sup>

Claimant followed up with Dr. Fevurly on November 22, 2013. Dr. Fevurly wrote based on a reasonable degree of medical certainty, claimant’s low back/left leg sciatica began two weeks prior and was not related to the September 2013 work event. Dr. Fevurly indicated the sciatica was most likely related to preexisting degenerative changes in claimant’s lumbar spine. Claimant continued under Dr. Fevurly’s original restrictions, although his neck, left upper back, and left arm pain had improved.

Dr. Fevurly again examined claimant on December 23, 2013. Dr. Fevurly noted claimant saw Dr. Cramer, his personal physician, and received a CT scan of the lumbar spine. Dr. Fevurly wrote the CT scan revealed a herniated disc in claimant’s lumbar spine. Dr. Fevurly opined claimant was still unable to work due to his low back pain and opiate medication. Dr. Fevurly wrote:

I have told him that the next step is to address his low back problem and his left leg radiculopathy which is not a work-related condition. If that is successful, then he might want to consider cervical spine intervention although at this point I remain fairly unconvinced that he has any significant radiculopathy coming from the cervical spine and the numbness and tingling in the left arm is most likely the result of his peripheral nerve entrapment.

I have not scheduled him for further visits here. That will be determined based on his results from his lumbar spine surgery which is evidently pending and ordered by his primary care doctor through his personal health insurance this morning.<sup>10</sup>

In a letter dated January 8, 2014, Dr. Fevurly stated claimant was not yet at maximum medical improvement. He indicated it was possible claimant would require

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 3-4.

further evaluation and treatment to the cervical spine once the lumbar spine condition was treated.

Dr. Edward Prostic evaluated claimant on January 15, 2014, at claimant's counsel's request. Claimant complained of low back and left leg pain, with consistent pain from the left hip down to the knee. He also described pain at the base of his neck with numbness going to the left little finger, as well as occasional numbness and tingling down the left leg to the great toe. After reviewing claimant's history, medical records, and performing a physical examination, Dr. Prostic determined:

On or about September 10, 2013, [claimant] sustained trauma to his spine during the course of his employment. He has had left C7 radiculopathy and left L5 radiculopathy. He should be offered epidural steroid injections to his low back. If he gets good response to the low back and continues with unacceptable neck and left upper extremity symptoms, injections can be given there as well. At the present time, he is unable to return to gainful employment. The work-related injury sustained September 10, 2013 while employed by [respondent] is the prevailing factor in the injury, the medical condition, and the need for medical treatment.<sup>11</sup>

Following a preliminary hearing, the ALJ issued an Order dated April 9, 2014, in which he found claimant's work-related accident was not the prevailing factor in causing the low back condition. The ALJ wrote:

It is believable this type of accident could cause a low back injury, but the lack of any mention of low back/leg symptoms in medical records until two months after the accident is inconsistent with a back injury on the date of accident. If the back/leg symptoms cropped up two months later, they probably arose independently of the dump truck accident.<sup>12</sup>

In a statement dated April 20, 2014, claimant's wife, Janet Beck, wrote that claimant injured his neck, left arm, low back, and left leg on the day of the work-related accident. She indicated his condition had not improved, and he complained of pain on a daily basis. Mrs. Beck testified claimant never complained of any back problems prior to the accident. Claimant's son, Bill Beck, Jr., and Charlotte Chambers, a family friend, also submitted statements. Mr. Beck testified claimant complained of pain in his hand and his low back the day of the accident. Ms. Chambers testified claimant complained of pain in his low back and neck shortly following the accident. Both Mr. Beck and Ms. Chambers stated claimant never complained of pain in these areas prior to the accident of September 10, 2013.

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<sup>11</sup> P.H. Trans. (Apr. 9, 2014), Cl. Ex. 2 at 7.

<sup>12</sup> ALJ Order (Apr. 9, 2014) at 2.

Claimant returned to Dr. Fevurly on June 25, 2014, with complaints of neck pain and left fifth finger numbness. Dr. Fevurly reported he and claimant “did not really go into great depth about his low back, left leg symptoms but they are still the predominant problem he has and the thing that is really limiting him to return to work at this point.”<sup>13</sup> Dr. Fevurly performed a physical examination and recommended further diagnostic testing of claimant’s cervical spine in the form of a CT myelogram. Dr. Fevurly opined claimant was not a good candidate for a cervical decompression surgery, but he indicated he would ask a spinal surgeon for an opinion following the CT myelogram. Dr. Fevurly continued claimant’s restrictions, which included a 10 pound lifting limit and no repetitive overhead work. Dr. Fevurly opined, “I do not think we are going to see any return to work until the non-work-related low back problem and left leg radiculopathy is addressed . . . .”<sup>14</sup>

Claimant has not worked since September 10, 2013.

#### **PRINCIPLES OF LAW**

K.S.A. 2013 Supp. 44-508(h) states:

“Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f) states, in part:

(1) “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor.

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<sup>13</sup> Fevurly Report (June 25, 2014) at 1.

<sup>14</sup> *Id.*

An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>15</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>16</sup>

### ANALYSIS

The ALJ found claimant failed to prove by a preponderance of the evidence that he injured his back in the September 10, 2013, work-related accident. The undersigned agrees. The medical evidence supports the ALJ's finding claimant failed to meet the burden of proving the work-related injury is the prevailing factor causing the low back condition and need for medical treatment.

In arriving at this conclusion, the ALJ found it significant there was no mention of low back pain in the emergency room records or in the Application for Hearing filed with the Division on November 6, 2013. There is no notation of low back pain in the medical records until November 14, 2013, when Dr. Fevurly noted claimant complained of new symptoms of numbness and burning in his left leg.

Dr. Fevurly wrote in his November 22, 2013, clinical note that the low back condition, sciatica, was not related to claimant's work-related injury but was most likely related to preexisting degenerative changes in the lumbar spine. A CT scan was performed by Dr. Cramer which, according to Dr. Fevurly, showed a herniated disc in the lumbar spine. The CT scan report is not a part of the record.

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<sup>15</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>16</sup> K.S.A. 2013 Supp. 44-555c(j).



Dr. Prostic states in his report the work-related injury sustained September 10, 2013, is the prevailing factor in causing claimant's injury, medical condition and need for medical treatment. This opinion is controverted by Dr. Fevurly's opinion that the low back is not related to the accident. Dr. Prostic's opinion is inconsistent with the onset of symptoms not appearing until two months after the accident in Dr. Fevurly's notes supporting the sudden onset of symptoms in early November 2013.

**CONCLUSION**

Claimant has failed to prove a work-related injury to the low back arising out of and in the course of his work-related accident while working for respondent on September 10, 2013.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated November 3, 2014, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2015.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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